IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re JAMES RICHARD BURKE and ROBIN E. BURKE, Debtors.	No. 01-23677 Chapter 7
MARY FOIL RUSSELL, Trustee, Plaintiff, vs. PIONEER CREDIT COMPANY, Defendant.	Adv. Pro. No. 02-2026

M E M O R A N D U M

APPEARANCES:

D. MICHAEL TRANUM, ESQ.
HUNTER, SMITH & DAVIS, LLP
Post Office Box 3740
Kingsport, Tennessee 37664
Attorneys for Mary Foil Russell, Trustee

JOSEPH B. LYLE, ESQ.
HALE & LYLE
Post Office Box 274
Bristol, Tennessee 37621-0274
Attorneys for Pioneer Credit Company

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This preference action is before the court on the plaintiff's motion for summary judgment. The court having concluded as discussed below that the plaintiff has established all the elements of a preference except 11 U.S.C. § 547(b)(5), the motion will be granted in part and denied in part. This is a core proceeding. See 28 U.S.C. 157(b)(2)(F).

I.

The debtors James and Robin Burke filed for chapter 7 relief on October 29, 2001, and plaintiff Mary Foil Russell, the chapter 7 trustee, commenced this adversary proceeding on April 16, 2002, against defendant Pioneer Credit Company ("Pioneer"). As alleged in the complaint and admitted in the answer, the debtors are indebted to Pioneer under two promissory notes and security agreements: the first, dated March 30, 2001, in the original principal amount of $8,330.92, granted Pioneer a security interest in a 2001 Harley-Davidson motorcycle; the second, dated April 23, 2001, in the principal amount of $4,806.63, evidences a security interest in a 1989 Ford automobile. Copies of the notes are attached to the complaint.

According to the complaint, the debtors and Pioneer first applied for a certificate of title on the motorcycle on August 31, 2001, and for the automobile on November 13, 2001. The

trustee asserts that absent delivery of the application to the county court clerk or the Division of Motor Vehicles within twenty days of the creation of a security interest, a security interest is perfected as of the date of delivery. The trustee further contends that pursuant to 11 U.S.C. § 547(b), she has the power to avoid the transfers of the debtors' interests in the motorcycle and automobile because they took place within ninety days of the bankruptcy filing, and therefore she is entitled to avoid the liens of Pioneer. Pioneer denies these allegations in its answer and denies that the trustee is entitled to any relief.

Presently before the court is the trustee's motion for summary judgment filed February 10, 2003. The motion is accompanied by the trustee's brief in support of the motion. Although the trustee sets forth in her brief certain "facts [which] are undisputed from the filings with the State of Tennessee and the deposition of Joe Musselwhite, former manager, of the defendant," the deposition was not tendered in connection with the brief and has not otherwise been submitted to the court. Contrary to the complaint and the admission of Pioneer in its answer, the brief erroneously states that the March 29, 2001 agreement gave Pioneer a security interest in both the motorcycle and the automobile, and makes no mention of the April

23, 2001 loan agreement although the April 23, 2001 loan agreement is attached to the brief. The brief further adds the additional statement that the debtors borrowed money from Pioneer again on or about October 29, 2001, and that in accordance with the October note, second liens on the automobile and the motorcycle were taken on November 13, 2001. Copies of the October 29, 2001 loan agreement and certificates of title evidencing both the first and second liens held by Pioneer are attached to the brief.

It is not clear from the brief whether the trustee seeks to avoid all the liens held by Pioneer or just the ones granted prepetition. Because the complaint has not been amended to raise the avoidance of the security interests granted on October 29, 2001, the court will only address the avoidability of the first liens granted to Pioneer in the automobile and motorcycle.

Pioneer has not responded to the trustee's motion although the time for doing so has expired. Under E. D. Tenn. LBR 7007-1, "[a] failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion." Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Accordingly, the court will examine the pleadings and documents in this case and ascertain whether they establish that the trustee is entitled to judgment as a matter of law.

II.

Section 547(b) of the Bankruptcy Code provides as follows:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made ... on or within 90 days before the date of the filing of the petition; ...
> (5) that enables such creditor to receive more than such creditor would receive if—
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

See 11 U.S.C. § 547(b).

The burden of proving the avoidability of a transfer under § 547(b) lies with the trustee. *See* 11 U.S.C. § 547(g). *See also Logan v. Basic Distribution Corp. (In re Fred Hawes Organization, Inc.)*, 957 F.2d 239, 242 (6th Cir. 1992). Because the elements of a preference set forth above have neither been

stipulated nor admitted by Pioneer in its answer, it is necessary for the court to examine the proof submitted by the trustee in this action and determine if she has satisfied her burden of proof with respect to each element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)(As the party bearing the burden of proof with respect to the various elements of § 547(b), the trustee must support her motion with admissions or evidence sufficient to establish the existence of each element of her case.).

With respect to the introductory requirement that there be a transfer of property of the debtor, it is settled law that the creation of a lien constitutes a transfer of property under § 547(b). *See Hendon v. GMAC (In re B&B Utilities, Inc.),* 208 B.R. 417, 421 (Bankr. E.D. Tenn. 1997). The term "creditor," as used in § 547(b)(1), is defined in 11 U.S.C. § 101(10) to include any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." A "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). The promissory notes attached to the complaint and the trustee's brief establish that Pioneer was a creditor of the debtors

because it had right to payment from the debtors arising from the notes.

A debt is antecedent if it was incurred prior to the transfer of a debtor's property. *Southmark Corp. v. Schulte Roth & Zabel (In re Southmark Corp.)*, 88 F.3d 311, 316 (5th Cir. 1996). For preference purposes, the transfer is deemed have occurred at the time the security interest is perfected unless perfection has not occurred as of the bankruptcy filing, in which event the transfer will be deemed to have been made "immediately before the date of the filing of the petition." 11 U.S.C. § 547(e)(2). The time of perfection is determined by state law. *Battery One-Stop Ltd. v. Atari Corp. (In re Battery One-Stop Ltd.)*, 36 F.3d 493, 495 (6th Cir. 1994).

TENN. CODE ANN. § 55-3-126(b) provides that:

> (1) A security interest or lien [in a motor vehicle] is perfected by delivery to the division of motor vehicles or the county clerk of the existing certificate of title, if any, title extension form, or manufacturer's statement of origin and an application for a certificate of title containing the name and address of the holder of a security interest or lien with vehicle description and the required fee.
>
> (2) The security interest is perfected as of the date of delivery to the county clerk or the division of motor vehicles.

Applying these legal principles to the facts of the present case, the debtors' transfer of a security interest in the

motorcycle took place when the application for a certificate of title was delivered to the appropriate governmental authority on August 31, 2001. Furthermore, this transfer was on account of an antecedent debt because it took place after the debt was created on March 29, 2001. With respect to the automobile, because Pioneer's security interest therein was not perfected as of the bankruptcy filing on October 29, 2001, the transfer for preference purposes is deemed to have occurred immediately prior to the filing. As this date was subsequent to the incurrence of the debt on April 23, 2001, the transfer was "on account of an antecedent debt."

The insolvency element of a preference set forth in § 547(b)(3), that the transfer be made while the debtor was insolvent, is supplied by 11 U.S.C. § 547(f) which creates a presumption of insolvency during the ninety days immediately preceding the filing of the bankruptcy petition. Because Pioneer has tendered no evidence challenging the debtors' insolvency, the presumption of insolvency is conclusive and this requirement is deemed established. *See In re B&B Utilities, Inc.*, 208 B.R. at 422.

There is no such presumption in the Bankruptcy Code for the last element of a preference, § 547(b)(5), that the transfer enabled the creditor to receive more than the creditor would

have received under chapter 7 if the transfer had not been made. This provision requires "the bankruptcy court to construct a 'hypothetical chapter 7 case;' i.e., to determine what the creditor would have received in a liquidation." *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 464 (6th Cir. 1991). The trustee has submitted no evidence, in the form of affidavit or otherwise, that establishes this hypothetical liquidation requirement. Absent such proof, the court is unable to conclude that the debtors' grants of security interests in the automobile and motorcycle are avoidable as preferences under § 547(b). *See Kelley v. Chevy Chase Bank (In re Smith)*, 231 B.R. 130, 135 (Bankr. M.D. Ga. 1999)(Court refused to take judicial notice of debtor's schedules to establish § 547(b)(5), observing that "it is not the duty of the court to comb through the materials submitted with a motion for summary judgment to find facts, which the movant failed to allege, that might prove an unsupported element of the movant's case."); *In re Mark Benskin & Co., Inc*., 135 B.R. 825, 832 (Bankr. W.D. Tenn. 1991)("In the absence of proof this Court should not assume that [the defendant] received more than he would have received in a Chapter 7 liquidation.").

III.

In accordance with the foregoing, the court will enter an order contemporaneously with the filing of this memorandum opinion granting the trustee's motion for summary judgment with the exception of the (b)(5) element of 11 U.S.C. § 547, the sole remaining issue for trial.

FILED: February 28, 2003

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE